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No. 88-2007

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICARDO J. BORDALLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied harmless error principles to petitioner's claim that the trial court violated his right to be present at all trial proceedings by excusing some potential jurors before calling the case for trial and swearing the venire.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 857 F.2d 519.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1988. In an order dated April 21, 1989, the court of appeals granted the government's petition for rehearing in part and denied petitioner's petition for rehearing. The petition for a writ of certiorari was filed on June 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Territory of Guam, petitioner was convicted on two counts of conspiracy to commit extortion, in violation of 18 U.S.C. 371; two counts of extortion, in violation of 18 U.S.C. 1951; one count of conspiracy to commit bribery, in violation of 18 U.S.C. 371; three counts of bribery, in violation of 18 U.S.C. 666(b) (Supp. III 1985); one count of conspiracy to obstruct justice, in violation of 18 U.S.C. 371; and one count of witness tampering, in violation of 18 U.S.C. 1512. He was sentenced to a total of nine years' imprisonment, five years' probation, $35,000 in fines, and $79,600 in restitution. The court of appeals affirmed petitioner's convictions for conspiracy to obstruct justice and witness tampering, but reversed the remaining convictions, holding that 18 U.S.C. 666(b) (Supp. III 1985) did not apply to officials of Guam and that the jury instructions on the extortion counts were erroneous. The court of appeals remanded for further proceedings, including resentencing. Pet. App. A1-A23.

1. The evidence at trial showed that, while he was the Governor of Guam, petitioner accepted money from several local businessmen in exchange for government contracts and other favors. Petitioner misled one of the businessmen, Johnny Carpio, into believing that the money he paid was used to help the poor. Carpio recounted that false version of events to the FBI. Later, acting on his belief that petitioner was not acting for personal gain, Carpio attempted to halt the investigation by preparing a false receipt and telling the FBI that petitioner had repaid the money he had received from Carpio. Petitioner also asked Carpio to testify falsely before the grand jury. Pet. App. A4-A5, A12-A14.

Petitioner's trial began on January 12, 1987. While the potential jurors who had been summoned for the trial were in the courtroom, but before they had been sworn or the case had been called, the district court excused some of them. Petitioner, his counsel, and the prosecutor were not present in the courtroom at the time. Petitioner's counsel learned of the court's action and, after the case had been called, entered a general objection. The court explained that it had excused some potential jurors because they were responsible for taking care of children; five or six others were released because they indicated "that they cannot be a fair and impartial juror because they worked at TV, or for [petitioner], or their work activity for a candidate." Pet. App. A6-A7; C.A. E.R. 46.

The court swore the 39 remaining members of the venire and began voir dire. Petitioner and his counsel were present from the time the case was called to the completion of the trial. After the jury had been sworn and counsel had completed opening arguments, petitioner moved for a mistrial. Pet. App. A6-A7. The district court denied the motion. The court reiterated that it had released individuals who demonstrated that they were responsible for taking care of minor children, businesspeople whose businesses would cease to exist if they were sequestered during a four-week trial, and four of five persons who asked to be excused because of "their close participation to both sides of the candidates"—*i.e.*, their political activities for or against petitioner or his political allies. C.A. E.R. 53-54; Pet. App. A6.[1]

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[1] The court also explained that the procedure it had followed was in keeping with its usual practice. After showing an instructional film and instructing the jury as to their responsibilites, the court stated, it routinely invited potential jurors having good grounds to come forward and make a request to be excused. C.A. E.R. 52-53.

2. The court of appeals affirmed in part, reversed in part, and remanded. With respect to the question presented by the petition, the court observed that Fed. R. Crim. P. 43 gives a defendant a right to be present during voir dire and when peremptory challenges are exercised, but not when a jury commissioner draws the names of potential jurors. Pet. App. A8. Noting that this case "[fell] somewhere between the ministerial stage of drawing the prospective juror pool and the formal pretrial narrowing of the pool through voir dire for a particular trial," the court concluded that this case was "more appropriately analogized to voir dire, because the prospective jurors knew which specific case they would hear, and some were excused due to factors related to [petitioner's] particular cause." *Ibid.* Accordingly, it ruled that petitioner or his counsel should have been permitted to be present when the district court excused the potential jurors in question. *Id.* at A8-A9.

The court concluded, however, that any error was harmless beyond a reasonable doubt. It found that "[t]he record is clear that those particular prospective jurors who were released would and should have been released in any event" and that the district court's release of those potential jurors "could not have contributed to the verdict." Pet. App. A9.

ARGUMENT

Petitioner contends (Pet. 7-14) that the court of appeals erred in applying harmless error analysis to his claim that the district court violated his right to be present when it excused potential jurors before calling his case for trial. In his view, "[a] violation of a defendant's right to be present while the jury is selected should never be treated as harmless error." Pet. 13. This Court's cases foreclose that contention, however, and there is no conflict among the

circuits that calls for the Court's attention. Further review is not warranted.

1. Fed. R. Crim. P. 43(a) and the Due Process Clause grant a criminal defendant the right to be present during his trial.[2] This Court has made clear, however, that any violation of that right is subject to conventional harmless error analysis. *Rushen* v. *Spain*, 464 U.S. 114, 117-120 (1983); *Rogers* v. *United States*, 422 U.S. 35, 40 (1975) (a "violation of Rule 43 may in some circumstances be harmless error"). *Rushen* and *Rogers* are consistent with many other decisions in which the Court has refused to characterize a variety of pretrial and trial errors as reversible per se.[3] Indeed, as the Court stated in *Rose* v. *Clark*, 478 U.S. 570, 579 (1986):

> [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that

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[2] Fed. R. Crim. P 43(a) states:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

[3] See *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986); *United States* v. *Lane*, 474 U.S. 438 (1986); *United States* v. *Hasting*, 461 U.S. 499 (1983). In *Lane*, for instance, the Court flatly rejected the notion that procedural errors can be categorically predetermined to be inherently prejudicial or reversible per se. Referring to the general harmless error provision in the Federal Rules of Criminal Procedure, the Court stated (474 U.S. at 448 n.11):

> [O]n its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a "substantial right" is implicated it is inherently "affected" by any error begs the question raised by Rule 52(a). Assuming there is a "substantial right," the inquiry remains whether the error "affects substantial rights" requiring reversal of a conviction.

any other errors that may have occurred are subject to harmless-error analysis.

Consistent with those authorities, the courts of appeals have frequently applied the harmless error doctrine to claims that a defendant has been deprived of the right to be present during a portion of a jury selection proceeding. See, *e.g.*, *United States* v. *Gordon*, 829 F.2d 119, 127-129 (D.C. Cir. 1987); *United States* v. *Willis*, 759 F.2d 1486, 1500 (11th Cir.), cert. denied, 474 U.S. 849 (1985); *United States* v. *Washington*, 705 F.2d 489, 496-498 (D.C. Cir. 1983); *United States* v. *Alessandrello*, 637 F.2d 131, 137-144 (3d Cir. 1980), cert. denied, 451 U.S. 949 (1981); *Proffitt* v. *Wainwright*, 685 F.2d 1227, 1258-1259 n.47 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983); *United States* v. *Brown*, 571 F.2d 980, 987 (6th Cir. 1978); *Henderson* v. *United States*, 419 F.2d 1277, 1278 (5th Cir. 1970); *Baker* v. *United States*, 401 F.2d 958, 964-966 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970).

2. There is no conflict between the court of appeals' decision and *United States* v. *Crutcher*, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969), that warrants this Court's review. In *Crutcher*, the defendant was absent during the entire jury selection proceeding, including voir dire and challenges to potential jurors. The Second Circuit observed in dictum that a defendant's right to be present during those proceedings "would appear" to be a right whose violation could not be considered harmless, since there was "no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impanelling of the jury." 405 F.2d at 244. But the court also acknowledged that "as a general rule a violation of Rule 43 does not require reversal if the record affirmatively indicates beyond a reasonable doubt

that the error did not affect the verdict," and it concluded (*ibid.*):

> [E]ven if the harmless error principle applies generally to departures from the mandates of Rule 43, the government has not been able to convince us that [the defendant] might not have been prejudiced by being absent.

In its subsequent decisions, the Second Circuit has not viewed *Crutcher*'s dicta as expressing a firm position on the question whether conducting jury selection in the defendant's absence is per se reversible error. In *United States* v. *Toliver*, 541 F.2d 958, 964 (2d Cir. 1976) (emphasis added), *Crutcher* was described only as having "indicated * * * that a defendant's absence during the empanelling of the jury *might be* too basic to be treated as harmless." In *Toliver* and *United States* v. *Fontanez*, No. 88-1567 (June 13, 1989), the Second Circuit applied the harmless error rule to claims that trial courts had conducted proceedings outside the defendants' presence, although it concluded in both cases that the error had been prejudicial. See also *United States* v. *Dioguardi*, 428 F.2d 1033, 1039-1040 (2d Cir.), cert. denied, 400 U.S. 825 (1970) (no reversible error in conducting sidebar discussions during jury selection outside defendants' earshot). In view of the equivocal nature of the dictum in *Crutcher*, this Court's subsequent decisions in *Rushen* and *Rogers*, and the very substantial distinction between the facts of this case and those in *Crutcher*, it is exceedingly unlikely that the Second Circuit would feel compelled by *Crutcher* to reverse a conviction on the basis of facts like those presented here.

Whereas in *Crutcher* it may have been difficult to determine what contribution the defendant might have made if he had been present during jury selection proceedings, the

facts of this case fully justify the court of appeals' conclusion that the release of certain potential jurors in petitioner's absence "could not have contributed to the verdict." Pet. App. A9. Those jurors were released for reasons—their inability to serve in a lengthy trial during which they were to be sequestered or their statements that they could not serve as fair and impartial jurors—that would have required them to be excused in any event.

The D.C. Circuit reached the same conclusion in a case with strikingly similar facts, *Baker* v. *United States, supra.* In that case, the trial court excused several jurors at a proceeding conducted several days before the commencement of the trial of a notorious political figure. The court mentioned the defendant's name to some of the potential jurors, and it released three individuals for reasons quite similar to those involved here—personal hardship or circumstances establishing that they had formed an opinion on the defendant's guilt or were connected to him or the investigation. 401 F.2d at 965. Finding that those individuals "would have been excused * * * when the case was called for trial in any event," the D.C. Circuit found that "it was at most harmless error to have conducted the [earlier] proceeding in the absence of the defendant." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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